United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

124

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 24,392

UNITED STATES OF AMERICA,

Appellee,

v.

ROBERT L. WILLIAMS,

Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT
COURT FOR THE DISTRICT OF COLUMBIA

BRIEF OF APPELLANT

United States Court of Appeals
for the District of Columbia Circuit

FILED SEP 11 1970

Nathan J. Paulson
CLERK

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Appointed by this Court

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BRIEF OF APPELLANT

STATEMENT OF THE ISSUES

1. Whether the trial court erred in receiving evidence taken from the defendant incident to an illegal arrest.

2. Alternatively, whether the trial court erred in the reception of evidence illegally seized from the defendant prior to his arrest and without his consent.

This case has not previously been before this court.

REFERENCES TO RULINGS

On March 13, 1970 the trial court denied defendant's Motion for Return of Property and to Suppress Evidence and Testimony. See order dated March 13, 1970 and Transcript Page 46. The trial court found defendant guilty on March 18, 1970. See judgment sentencing defendant to two to seven years filed May 22, 1970 and Transcript Page 69.

STATEMENT OF THE CASE

This is an appeal from a judgment of the District Court finding defendant guilty of violating 22 D.C. Code 1801(b) and 2202, second degree burglary and petit larceny respectively. The case was tried without a jury before Chief Judge Curran. Prior to trial defendant moved to suppress the use of virtually all evidentiary materials in the government's possession ". . . on the grounds that they were obtained by an illegal search and seizure incident to the arrest of the defendant made without warrant or probable cause . . ." (Motion for Return of Property, etc. P. 1) The court, after hearing, denied the Motion. The challenged evidentiary material consisted of testimony as to the results of an examination of defendant's hand with an ultra-violet light which had revealed the presence of sneak-thief powder, a key taken from defendant which unlocked the door to the police property room from which the property had been stolen, and the stolen property itself, five dresses. The propriety of the trial court's denial of the motion to suppress and its consequent reception of and reliance on testimony as to the test results (Tr. 62) and the stolen dresses (Tr. 58) are the central issues on appeal.

Defendant was employed as a janitor by Harlow Typographical, Inc., at 35 K Street, N. E. (Tr. 52, 53, Kerick testimony) His general duties included cleaning and waxing the building, including the first floor thereof which was rented from Harlow by the Metropolitan Police Department and used as headquarters for the Criminal Investigations Division East. (Tr. 8, 9, Kerick Testimony)

At approximately 6:45 a.m. on October 26, 1969, Defendant reported to work. (Tr. 38, Coachman testimony) At approximately 10:00 a.m. Detective Kerick, the arresting officer, observed that five dresses which had been stored in the police property room at the back of the first floor, were missing. (Tr. 13, Kerick testimony) The door to that room had been locked earlier that morning before defendant's arrival. (Tr. 11, Kerick testimony) The missing dresses had been placed in the police property room by Detectives Genoa and Kerick at approximately 6:00 a.m. the same morning and had been dusted with sneak powder, a substance which is invisible to the naked eye but is visible when illuminated by an ultra-violet light. (Tr. pp. 10, 16, Kerick Testimony) Upon observing that the dresses were missing the police unsuccessfully searched the entire premises at 35 K Street to find them. (Tr. 14, Kerick testimony)

At approximately 1:00 p.m. after defendant had finished his cleaning duties and was preparing to leave work he and his co-worker, Richard Coachman, were both approached by Detective Smith, Sgt. Genoa, Lt. Gosman and Det. Kerick, who asked them whether they knew anything about the property missing from the police property room. (Tr. 60, Kerick testimony; Tr. 41, Williams testimony; Tr. 38, Coachman testimony) Both Coachman and defendant denied any knowledge of the theft. (Tr. 15, Kerick testimony) Immediately thereafter, the two men were separated and taken into separate offices for interrogation. (Tr. 32, Gosman testimony) Just prior to defendant's being led off by two police officers to the room where he was interrogated, he was "advised of his rights." Det. Smith read the Police Department Form 47 to defendant in its entirety, except that the sentence, "You are under arrest" was not read to defendant. (Tr. 16, Kerick testimony). Defendant was not so advised since, in the opinion of Kerick, "he wasn't under arrest at this time", but was merely a suspect. (Tr. 28, Kerick testimony; Tr. 32, Gosman testimony)

The course of events upon defendant's entering the office is in dispute. According to Det. Kerick, he

> "explained to him first that property that had been missing had been treated with a powder. And then I asked him if he would mind putting his hand under a light. And he said, no, he had nothing to hide. And he placed his hand under a light and I turned on the light." (Tr. 19)

The light showed the presence of the sneak-thief powder whereupon Kerick immediately arrested defendant, again advised him of his rights, and searched him. (Tr. 19-21, Kerick testimony) The search revealed narcotics paraphernalia, and a key which opened the police property room. (Tr. 64, Kerick testimony) At this time, according to Detective Kerick, defendant stated that he had stolen the dresses in order to support a narcotics habit and led the police to the dresses. (Tr. 22, Kerick testimony) Detective Kerick testified that at no time did defendant request a lawyer. (Tr. 22)

Defendant, to the contrary, testified that as soon as he was placed in the interrogation room Detective Gosman told him the police only sought to recover the missing property and were not interested in

pressing charges if they recovered it. (Tr. 43) Defendant further testified that he asked to call a lawyer but was not allowed to (Tr. 45) and that he did not consent to the ultra-violet light test. (Tr. 45)

We show below that even if no credit whatsoever is given to defendant's testimony, all the evidence in the government's possession and upon which defendant's conviction was grounded, should have been suppressed and that its admission as evidence was prejudicial error.

ARGUMENT

I. SINCE DEFENDANT WAS IN FACT ARRESTED WHEN POLICE ESCORTED HIM INTO THE INTERROGATION ROOM, AND SINCE THE POLICE HAD NO PROBABLE CAUSE TO ARREST AT THAT TIME, THE DISTRICT COURT SHOULD HAVE SUPPRESSED ALL EVIDENCE PROCURED AS A RESULT OF THE ILLEGAL ARREST.

See Transcript pp. 16, 18-21, 32, 34, 35, 38, 39, 41, 45.

A. Defendant was restrained of his liberty upon being taken into the interrogation room and so understood his situation at that time.

Defendant contends that as soon as he was escorted by two police officers into the interrogation room he was "restrained of his liberty" and in fact

under arrest, that experienced police officers by their own testimony did not have probable cause to arrest defendant until they obtained further evidence against him and that the subsequent seizure of evidence from defendant, by means of the ultraviolet light, was the fruit of the unlawful arrest and should have been suppressed by the trial court.

The undisputed facts culminating in defendant's being led to the interrogation room clearly add up to an arrest under prior decisions of this court. After the defendant had finished work and was leaving the job to go home (Tr. 45, Williams testimony) he was stopped by several police officers in the hall of the police station where he worked and "was taken" by two detectives into a small office for the purpose of interrogation. (Tr. 32, Gosman testimony) Although the police testified that defendant was not then under arrest, defendant was off duty, was separated from his co-worker and escorted by two detectives -- one in front and one in back (Tr. 45, Williams testimony) -- into another room behind closed doors (Tr. 20, 21, Kerick

testimony) and ". . . would have been rash indeed to suppose he was not under arrest . . ." by the time the door to the interrogation room closed behind him. Kelley v. U.S., 111 U.S. App. D.C. 396, 398; 298 F.2d 310, 312; Jackson v. U. S., 118 U.S. App. D.C. 341; 326 F.2d 579 (1964).

In Kelley, the defendant, a previously convicted felon, was asked to step out of a restaurant to answer a few questions. Upon his exit to the street police officers asked Kelley:

> "What is that bulging out of your change pocket?", whereupon the appellant said: "I have some marijuana cigarettes." The officer then commanded "Pull it out", and appellant pulled out a cellophane package with "Chesterfield" on the label and handed it to one of the officers. Thereupon the officers testified, appellant was "placed under arrest and then he was searched." (111 U.S. App. D.C. at 397; 298 F.2d at 311)

The court found that the appellant was under arrest when he was escorted from the restaurant for questioning:

> That the appellant was restrained of his liberty and so understood can hardly be doubted as he left the restaurant with one officer leading the way and the other either along side or behind the appellant. (111 U.S. App. D.C. at 398; 298 F.2d at 312)

The court found it irrelevant that Kelley was submissive and did not resist the police's demand, particularly in light of his prior history as a convicted felon. Since police had no probable cause to arrest Kelley when they did, the marijuana was the fruit of an illegal arrest and was therefore suppressed.

Similar facts were also found to constitute an arrest in Jackson v. U.S., 118 U.S. App. D.C. 341, 336 F.2d 579 (1964). There, the police, acting on an informer's tip that Jackson had narcotics on his person, entered a delicatessen and asked Jackson to step outside so they could talk to him (118 U.S. App. D.C. at 342; 336 F.2d at 580). The court, relying on Kelley, supra, held "if appellant was not arrested when he was asked to step outside, he was certainly under arrest by the time he was escorted outside and questioned by the police." (118 U.S. App. D.C. at 342, 336 F.2d at 580)

These two cases are controlling.[1/] Even if defendant was not under arrest when initially stopped

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1/ See also Morton v. U. S., 79 U.S. App. D.C. 329, 331, 147 F.2d 28, 30 (1944). The court found that the defendant was under arrest when following police's instruction, he left his apartment to speak to an officer parked in a car.

in the main office section of the police station, he was definitely under arrest when he "was taken" by two policemen into the small sergeant's room for questioning behind closed doors. (Tr. 32, Gosman testimony) Every action by the officers suggests arrest -- defendant was stopped as he was about to leave the building (Tr. 45, Williams testimony), read his rights (Tr. 16, Kerick testimony), separated from his friend (Tr. 18, Kerick testimony), and escorted by two police from a large main hall to a smaller enclosed room. Such action constitutes an arrest under both Kelley and Jackson.

The fact that police did not formally proclaim that defendant was in custody until after the ultra-violet light test is not relevant. An officer may effect an arrest before officially announcing that fact. Kelley, 111 U.S. App. D.C. at 298, 298 F.2d at 312. "A man is under arrest at that point when the officer has effectively restrained the defendant, and the defendant is cognizant of that restraint. Kelley v. United States, 111 U.S. App. D.C. 396, 298 F. 2d 310 (1961)" United States v. Washington, 249 F. Supp. 40, 41 (D.D.C. 1965) aff'd 130 U.S. App. D.C. 374, 401 F. 2d 915 (1968).

Here defendant's liberty was restrained when he was taken into the interrogation room and his direct testimony shows he was well aware of that restraint:

> Q. What do you think would have happened to you if you had decided to leave?
>
> A. We had already decided to leave and they told us to wait, that they wanted to talk to us. (Tr. 45)

Defendant was therefore under arrest.

B. No Probable Cause to Arrest Existed When Defendant Was Taken into the Interrogation Room.

Although defendant was under arrest as soon as he entered the interrogation room, the police had no probable cause to detain him until the light test indicated the presence of sneak-thief powder on his hands. The police officers involved, two detectives, one lieutenant and a sergeant were not rookies but high ranking, experienced officers who undoubtedly would not formally arrest defendant until they had probable cause to do so. The uniform police testimony was that defendant was not arrested until after the light test

was administered. (Tr. 18, 19-20, 21, 28, 34, 38, 39) This is the reason that the sentence "You are under arrest" was omitted from the reading of the rights card, P.D. 47 (Tr. at 16, 35, 41) prior to defendant's being led into the interrogation room. Defendant was only "under suspicion" at this time. (Tr. 32, Gosman testimony) Inherent in this admission is the fact that probable cause for arrest did not exist until after the test. This analysis, that probable cause did not exist until after the test, is the only possible one and the one, in fact, made by the arresting officers.

The actual arrest, as we have shown, occurred when the police brought defendant into the interrogation room. It was a direct result of this illegal arrest that the police were able to administer the test and thus acquire probable cause to arrest. Probable cause for arrest, however, cannot be based on evidence seized after the arrest, Brinegar v. U.S., 338 U.S. 160 (1949); McDonald v. U.S., 338 U.S. 451 (1948). Nor can unconstitutional search be justified by what it uncovers, Bumper v. State of North Carolina, 391 U.S. 543 (1968). Since there was no probable cause to arrest at the time the defendant was led into the interrogation room, his arrest was unlawful and any evidence seized as a result of that illegal detention should have been suppressed. U.S. v. Weeks, 232 U.S. 383 (1914); Wong Sun v. U.S., 371 U.S. 471 (1963).

II

ALTERNATIVELY, IF DEFENDANT WAS NOT ARRESTED UNTIL AFTER THE TEST WAS GIVEN, HE WAS UNDER NO DUTY TO SUBMIT TO SEARCH BEFORE ARREST, DID NOT VOLUNTARILY DO SO, AND THE TEST RESULTS AND FRUITS THEREOF SHOULD HAVE BEEN SUPPRESSED

See Transcript pp. 15, 16, 19, 29, 33, 45.

If, as the government may argue, defendant was not under arrest when he was subjected to the ultra-violet light test, then seizure of evidence from his person without a warrant, or probable cause to arrest him, was in violation of the Fourth Amendment. Davis v. Mississippi, 394 U.S. 721 (1969) (fingerprints obtained during illegal detention); Bynum v. U.S., 104 U.S. App. D. C. 368, 262 F.2d 465 (1959) (fingerprints obtained during illegal detention).[1/]

The Supreme Court, in Davis v. Mississippi, supra, relying on this court's decision in Bynum, supra,

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1/ We have found only one case involving a fluorescent light examination: U.S. v. Richardson, 388 F.2d 842 (6th Cir. 1966), holding that a defendant "voluntarily consented" (388 F.2d at 845) to such a test. In dicta, the court said that such examination was not a search under the Fourth Amendment. However, there is no basis for distinguishing between fingerprinting, which both this court in Bynum and the Supreme Court in Davis have held subject to Fourth Amendment prohibitions, and similar scientific tests for detecting "traces" linking an accused to stolen property. Indeed, it may well be that Davis, in effect, overruled Richardson.

suppressed the use of fingerprints at trial where the prints were taken from defendant during a period of detention without probable cause. The court expressly rejected the state's contention that it should be allowed to seize such evidence in "investigatory" detentions, like defendant's here, as opposed to "accusatory" detentions. The court further noted the fact that fingerprinting is a reliable means of identification could not whittle down a defendant's Fourth Amendment rights:

> "Our decisions recognize no exception to the rule that illegally seized evidence is inadmissible at trial, however relevant and trustworthy the seized evidence may be as an item of proof. The exclusionary rule was fashioned as a sanction to redress and deter overreaching governmental conduct prohibited by the Fourth Amendment. To make an exception for illegally seized evidence which is trustworthy would fatally undermine these purposes." (394 U.S. at 724)

The principles of Davis are controlling here. Like Davis, the defendant's conviction in this case was based entirely on evidence obtained as a result of a scientific test. And like Davis, the defendant's detention, during the investigatory stage of the proceedings, was solely for the purpose of administering the test. Finally, in both cases, there was no probable

cause for arrest until after the seizure which was made without a warrant or an arrest.

Since there was no warrant to search and no probable cause to arrest until after the test, the only question is whether defendant voluntarily submitted to the test, as the government will urge. The defendant's initial contact with police was certainly not voluntary. To begin with, defendant was about to leave for home when the police stopped him and Mr. Coachman in the hall (Tr. 45, Williams testimony). On being asked whether the defendant would mind speaking to the police, defendant stated only, "Me too," (Tr. 16) after the other janitor, Mr. Coachman stated, "I have nothing to hide - I will be glad to talk to you . . ." (Tr. 15, Kerick testimony). It was on the basis of defendant's "me too" that he was taken into the sergeant's room and confronted with the ultra-violet light.

At this point there is considerable conflict in the testimony as to whether the defendant agreed to submit to the test. Defendant testified that his hand was put under the light only after the dresses were recovered (Tr. 44) and that he requested a lawyer after Detective Smith read him the rights card (Tr. 45). The police, on the other hand, testified that the defendant

did not want a lawyer and that defendant's hand was tested before the property was recovered (Tr. 33, Gosman testimony). This conflict does not suggest a willing submission to the search.

In any event, giving complete credit to police testimony, all the defendant said on being asked whether he would mind putting his hand under the ultra-violet light was, "no, he had nothing to hide." (Tr. 19, Kerick testimony). This court has consistently refused to imply a waiver of important constitutional rights based on such slender evidence of consent.

Although an individual may consent to a search, "such a waiver or consent must be proved by clear and positive testimony, and it must be established that there was no duress or coercion, actual or implied. Amos v. U.S., 255 U.S. 313" Judd v. U.S., 89 U.S. App. D.C. 64, 66, 190 F.2d 649, 651 (1951). The government's burden, moreover, reaches its zenith when the "consent" to a search is given during interrogation in a police station. The Supreme Court in discussing consent searches has stated: "When a prosecutor seeks to rely upon a consent to justify the lawfulness of a search, he has the burden of proving that the consent was, in fact, freely and voluntarily given." Bumper v. State of North Carolina,

391 U.S. 522, 548 (1968). Consent, moreover, is not equivalent to nonresistance to police suggestions. Johnson v. U.S., 333 U.S. 10, 13 (1948); Amos v. U.S., 255 U.S. 313, 317; Higgins v. U.S., 93 U.S. App. D. C. 340, 209 F.2d 819 (1954).

In Judd this court held a defendant's station-house statement that the police could go to his house since he had nothing to hide did not establish a waiver of Fourth Amendment rights. The statement here is virtually identical to that in Judd. Here, the defendant, on being asked by the police whether he would mind putting his hand under the ultra-violet light, said only, "no, he had nothing to hide" (Tr. 19, Kerick testimony). This statement does not meet the standard of a free and voluntary consent to a search but is "consent secured by force" prohibited by Judd, 89 U.S. App. D. C. at 66, 190 F.2d at 651.

This court also dealt with a virtually identical "consent" search in Higgins, supra. There, the defendant allowed the police into his living room where they explained that they wanted to talk to him about information they received that he was involved in narcotic drug traffic. After the defendant denied any involvement in illegal drug traffic, the police asked if they could

look around. The defendant consented and the police found marijuana seeds and cigarettes in his room for possession of which defendant was immediately arrested. This court held that the search was illegal since the government had not shown any meaningful consent to the search:

> "No sane man who denies his guilt would actually be willing that policemen search his room for contraband which is certain to be discovered. It follows that, when police identify themselves as such, search a room, and find contraband in it, the occupant's words or signs of acquiescence in the search, accompanied by a denial of guilt, do not show consent . . ." (Higgins v. U.S., 93 U.S. App. D. C. 340, 341, 209 F.2d 819, 820 (1954)).

The situation here is exactly analogous to Higgins. Here, the police explained to defendant that some property was missing. The defendant denied any knowledge about the missing property and agreed to speak to the police. The police then explained that the stolen property had been dusted with sneak-thief powder, traces of which would show up on defendant's hand if he had touched the stolen property and that they wished to examine the defendant's hand with the light. The defendant's consent was like defendant's consent in Higgins in that he knew what the examination would show

but because of the natural duress of the situation acquiesed to police suggestions. Consent under such conditions is not voluntary and the government has not shown that the consent given was voluntary, unequivocal, specific, intelligent, and uncontaminated by duress or coercion.[3/]

It follows that the police seized evidence from the defendant, without a warrant, prior to his arrest and without his consent. Accordingly, all testimony relating to the test results should have been suppressed along with the remainder of the government's evidence - the key, the stolen dresses, and testimony relating thereto. Without this evidence it is plain defendant's conviction cannot stand.

3/ See Channel v. U.S., 285 F.2d 217 (9th Cir. 1960). In Channel the court found that the statement "No, my apartment is clean, there is nothing there. You can go and search the place," did not show a specific and unequivocal consent to search the defendant's apartment without a warrant. Id. at 220.

CONCLUSION

For the foregoing reasons appellant respectfully submits the judgment of the trial court must be reversed.

Respectfully submitted,

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Appointed by this Court

CERTIFICATE OF SERVICE

I hereby certify I have served the foregoing Brief of Appellant upon the United States by mailing two copies thereof to John A. Terry, Assistant U. S. Attorney, United States Court House, Washington, D. C. 20001, this 11th day of September, 1970.

Stephen M. Truitt

Stephen M. Truitt
Attorney for Appellant
Appointed by this Court

BRIEF FOR APPELLEE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 24,392

UNITED STATES OF AMERICA, APPELLEE

v.

ROBERT L. WILLIAMS, APPELLANT

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

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Cr. No. 471-70

United States Court of Appeals
for the District of Columbia Circuit

FILED NOV 27 1970

Nathan J. Paulson
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OTHER REFERENCES

*Cases chiefly relied upon are marked by asterisks.

ISSUES PRESENTED*

In the opinion of appellee, the following issues are presented:

1. Whether appellant voluntarily agreed to talk to police regarding a robbery of which he was suspected and to place his hand under an ultra-violet light in order to determine the presence of sneak-thief powder.

2. Whether, if appelant did not cooperate voluntarily with the police, their detaining him and conducting the ultra-violet light test were in violation of the Fourth Amendment standard of reasonableness.

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*This case has not previously been before this Court.

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

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ROBERT L. WILLIAMS, APPELLANT

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

BRIEF FOR THE APPELLEE

COUNTERSTATEMENT OF THE CASE

In an indictment filed December 30, 1969, in Criminal Case No. 2020–69, appellant was charged with second-degree burglary and petit larceny, in violation of 22 D.C. Code §§ 1801 (b) and 2202, respectively. He filed a motion to suppress evidence in that case, which was heard by the Honorable Edward M. Curran on March 13, 1970, and denied. Thereafter, on March 18, a superseding indictment was filed in Criminal Case No. 471–70. Appellant waived trial by jury and was tried by Chief Judge Curran on that date. He was found guilty, and on May 22, 1970, the court imposed a sentence of two to seven years' imprisonment. This appeal followed.

The testimony at the hearing on the motion to suppress showed that on Sunday morning, October 26, 1969, five dresses were stolen from the property room at the headquarters of the Criminal Investigations Division (CID) East, Metropoli-

tan Police, located on the first floor of a building at 35 K Street, N.E. (Tr. 6). Appellant was a janitor employed by Harlowe Typographical, Inc., which owned the building (Tr. 9). On that day, appellant and his co-worker, Richard Coachman, were cleaning and waxing the first floor (Tr. 11–12). There had been several recent thefts from the property room, which was kept locked; only certain officers had keys (Tr. 8). At about 6:00 a.m. on October 26 Detectives Charles Kerrick and Nicholas Genua placed five dresses in the property room. They had been marked and dusted with sneak-thief powder, which becomes visible only under ultra-violet light. The officers locked the room and went to main police headquarters to attend a roll call (Tr. 12).[1]

Detectives Kerrick and Genua returned to CID East shortly after 10:00 a.m. (Tr. 12) and discovered that the dresses were missing (Tr. 13). Genua called Detective Lieutenant Keith Gosman, his superior, and Mr. Harlowe, the janitors' employer, while Kerrick watched the building exits from a squad car (Tr. 13–14). After Gosman and Harlowe arrived about 1:00 p.m., a search of the building was conducted, but nothing was found (Tr. 14).

Detective Kerrick testified that shortly after 1:00 he and the three other detectives—Gosman, Genua and Smith—approached appellant and Coachman in the main office where they were finishing waxing the floor (Tr. 14–15). He stated that Lieutenant Gosman told appellant and Coachman that some property was missing and asked to speak to them about it (Tr. 15, 17). Both agreed, Coachman stating: "I have nothing to hide—I will be glad to talk to you" (Tr. 15), and appellant adding, "Me too" (Tr. 16). Detective Smith then advised them that they were not under arrest but that the officers wanted to advise them of their rights prior to speaking with them (Tr. 16–18). He read the *Miranda* warnings from a standard Form PD–47, omitting only the first sentence, "You are under arrest" (Tr. 16). The suspects were asked if they understood

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[1] Detective Kerrick testified at trial that only appellant, Mr. Coachman and a Detective Smith remained in the building (Tr. 57).

what he had read, and both indicated that they did (Tr. 18). After they indicated that they were willing to talk and that they understood their rights, the suspects were escorted from the hallway, where they had been standing, into separate offices across the hall from the main office (Tr. 18). Kerrick testified that not more than two or three minutes elapsed between the time appellant and Coachman were approached and the time they entered the offices (Tr. 19).

Lieutenant Gosman and Detective Kerrick entered an office with appellant (Tr. 19). Kerrick explained to him that the stolen dresses had been treated with sneak-thief powder and asked him "if he would mind" placing his hand under the light (Tr. 19). He stated that this procedure would either "clear" appellant "or prove him to be guilty" (Tr. 66). Appellant, indicating no objection, placed his hand under the light (Tr. 19–20, 27). The powder on his hand became visible, and he was immediately placed under arrest and searched (Tr. 20). He was advised he could have a lawyer if he wished, and he indicated he knew what his rights were (Tr. 21). The search uncovered narcotics paraphernalia and a master key to the property room (Tr. 20–21). Appellant then confessed to having stolen the dresses and showed the officers where he had hidden them (Tr. 22–24).[2]

Detective Kerrick testified that approximately ten to fifteen minutes elapsed between the time that he and Lieutenant Gosman entered the office with appellant and the time they left to retrieve the dresses (Tr. 23). At no time during this period did appellant request a lawyer or indicate he wished to assert any of the rights explained to him in the hallway (Tr. 20, 24–25).

Lieutenant Gosman, called by appellant to testify at the hearing, indicated that appellant and Coachman were told they were under suspicion but not under arrest when they were approached in the hall (Tr. 32, 35); that they were advised of their rights by Detective Smith's reading from a Form PD–47, and that they agreed to talk, indicating they had nothing to

[2] Neither the narcotics paraphernalia nor appellant's inculpatory statements were introduced at trial.

hide (Tr. 32). He stated that the time between Smith's reading from the PD–47 and appellant's placing his hand under the ultra-violet light was no more than a minute or a minute and a half (Tr. 33) and that the entire questioning took approximately ten minutes (Tr. 35). Lieutenant Gosman confirmed that appellant did not request a lawyer (Tr. 33).

Detective Kerrick, when asked what would have happened if appellant had not been willing to talk and had attempted to walk out, indicated that he probably would have been allowed to go, since he was not under arrest (Tr. 28). Lieutenant Gosman indicated that since appellant "willingly cooperated," he did not know what would have happened (Tr. 34).

Richard Coachman, called by the defense, indicated he and appellant were told they were not under arrest when they were advised of their rights and asked to discuss the missing property (Tr. 38).

Appellant testified that he and Coachman were stopped and told of the missing property. The officers indicated they wished to speak to them and advised them of their rights (Tr. 42, 44–45). At this point, appellant testified, he requested a lawyer and was told he could make a phone call in a couple of minutes (Tr. 45). Appellant stated that Detective Genua (who had testified he was never in the room while appellant was being questioned (Tr. 36)) promised him that no charges would be pressed if he helped recover the property (Tr. 43). He indicated that he gave his keys to Lieutenant Gosman upon request and was taken to the property room, where they were tested to determine if any would unlock the door (Tr. 44). Appellant then returned to the office where he was being questioned. After the missing property was recovered, his hand was placed under the light (Tr. 44). Appellant was asked what he thought would have happened "if you had decided to leave" rather than answering questions. He stated: "We had already decided to leave and they told us to wait, they wanted to talk to us" (Tr. 45).

The court denied the motion after hearing argument (Tr. 47). At the trial only Detective Kerrick testified, and his testimony was substantially the same as that given at the pre-trial hearing (Tr. 50–68).

ARGUMENT

I. Appellant was not arrested without probable cause or otherwise detained in violation of the Fourth Amendment.

(Tr. 1–47)

Appellant contends that he was arrested without probable cause or, alternatively, that the ultra-violet light test to determine the presence of sneak-thief powder was administered without his consent. Our position is that the evidence shows that appellant freely and voluntarily agreed to talk to the police and to place his hand under the lamp for the test. Even if appellant had not voluntarily cooperated, however, we maintain that the brief detention at the scene and the conduct of the test would have been fully consistent with the requirements of the Fourth Amendment.

A. Appellant was not under arrest when he voluntarily accompanied police into the sergeant's office for questioning.

Appellant was not formally arrested until after the presence of sneak-thief powder on his hand had been detected. He argues, however, that he was in fact under arrest before the ultra-violet light test was conducted.

The police officers at the hearing acknowledged that they did not have probable cause to arrest appellant when they approached him. Accordingly, they specifically advised him that they suspected him of stealing the dresses, but that he was not under arrest; and that they wanted him to talk to them about it, although he was not obliged to do so. At this time, or at least when he went to the sergeant's office for questioning, appellant argues, he was under arrest because he was "restrained of his liberty and so understood." *Kelley* v. *United States,* 111 U.S. App. D.C. 396, 398, 293 F. 2d 310, 312 (1961); *see Jackson* v. *United States,* 118 U.S. App. D.C. 341, 336 F. 2d 579 (1964).[3]

[3] In both *Kelley* and *Jackson* police approached an individual inside a restaurant and asked or commanded that he accompany them outside. In *Kelley* the police demanded that defendant empty his pockets; marijuana was discovered. The defendant in *Jackson* began to run after the police began questioning him. He was tackled and searched; narcotics were recovered.

The test which this Court has articulated for determining whether a person is under arrest is "not what the defendant . . . thought, but what a reasonable man, innocent of any crime, would have thought had he been in defendant's shoes." *Hicks* v. *United States*, 127 U.S. App. D.C. 209, 212, 382 F. 2d 158, 161 (1967), quoting from *United States* v. *McKethan*, 247 F. Supp. 324, 328 (D.D.C. 1965). This Court recently applied this test to circumstances comparable to those involved here. *Fuller* v. *United States*, 132 U.S. App. D.C. 264, 407 F. 2d 1199 (1968), *cert. denied*, 393 U.S. 1120 (1969). Police suspected Fuller of a rape-murder because his address book had been found near the scene. The next day they visited Fuller's place of work in Maryland near closing time and asked to speak to him about "an incident in Washington." They advised "that he did not have to talk to them" and that an interview could be held "on the spot or at a local police station." It was noisy at Fuller's place of work; he "said he had no objection to accompanying the three officers to the . . . police station." Fuller was interrogated in a "small, unused office in the back of the station." The officers told him the subject of investigation and asked him about his activities during the critical time. Fuller initially denied any knowledge of the crime, but after being confronted with the address book he made an inculpatory statement. The officers immediately placed him under arrest; the interrogation had taken ten to fifteen minutes at this point. 132 U.S. App. D.C. at 269, 407 F. 2d at 1204. Fuller testified that he believed he was under arrest when he accompanied the officers to the police station. The District Judge concluded, however, that there was then no probable cause for arrest, that the police "fully understood" this, and that "appellant had no reason to think he was under arrest at that time." 132 U.S. App. D.C. at 273, 407 F. 2d at 1208. This Court agreed, stating "appellant was

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This Court held that defendant was, in each case, under arrest by the time he left the restaurant. There is no indication in either case that the police indicated to the defendant that he was not obliged to talk to them. Nor is there any indication in either that the police had reasonable suspicion short of probable cause. In *Kelley* vagrancy squad officers admitted they had no basis for believing defendant was or had been invovled in a crime. In *Jackson* they had only the word of an informer whose reliability was not demonstrated.

not arrested, nor was there probable cause to arrest him, until his statement at the police station." 132 U.S. App. D.C. at 274, 407 F. 2d at 1209.

In the present case, appellant was similarly not under arrest until the officers formally placed him under arrest after he had inculpated himself by placing his hand under the ultra-violet light. Regardless of what appellant himself may have subjectively believed when he was approached in the hallway or when he entered the small room, a reasonable man, advised that he was not under arrest and candidly told he was not obliged to talk, would not have thought he was under arrest.

B. Stopping and briefly detaining appellant would have been proper if he had not agreed to talk with the police because they had a reasonable suspicion that he had stolen the property.

Whether appellant, had he insisted upon it, would have been allowed to leave, is speculative. Although he testified that he had decided to leave and was told to wait because the officers wanted to talk to him, he did not specifically indicate that he asked or made any attempt to leave. Had he done so, Detective Kerrick testified, he would probably have been allowed to leave, but Lieutenant Gosman stated he did not know what would have happened. The reality of this and other police-citizen confrontations may be as Judge Leventhal suggested, concurring in *Bailey* v. *United States*, 128 U.S. App. D.C. 354, 364, 389 F. 2d 305, 315 (1967):

> People who are stopped for some questions generally stay stopped until police indicate they can go. If states of mind at the moment could be discerned, most people would say, I think, that while they were certainly not under arrest, neither were they free to go.

The right of the police, without probable cause, to stop suspicious persons, question them and detain them briefly is well established. *Young* v. *United States*, D.C. Cir. No. 21,756, decided June 26, 1970; *see, e.g., Coleman* v. *United States*, 137 U.S. App. D.C. 48, 59, 420 F. 2d 616, 627 (1969) (Chief Judge Bazelon concurring); *Brown* v. *United States*, 125 U.S. App. D.C. 43, 365 F. 2d 976 (1966); *Scarbeck* v. *United States*, 115

U.S. App. D.C. 135, 317 F. 2d 546 (1962), *cert. denied*, 374 U.S. 856 (1963). In *Terry* v. *Ohio*, 392 U.S. 1 (1968), the Supreme Court stated that "a police officer may in appropriate circumstances and in an appropriate manner approach a person for purposes of investigating possibly criminal behavior even though there is no probable cause to make an arrest." 392 U.S. at 22. *See also Rios* v. *United States*, 364 U.S. 253 (1960). This Court has asserted the duty of citizens to respond to police inquiries, *see Coates* v. *United States*, 134 U.S. App. D.C. 97, 413 F. 2d 371 (1969), and has approved "limited and brief restraints by the police" during an investigation. *Allen* v. *United States*, 129 U.S. App. D.C. 61, 64, 390 F. 2d 476, 479 (1968).

The question in the final analysis in all situations in which police stop a suspicious person without probable cause for a full-scale arrest is the reasonableness of police conduct under all the circumstances of a particular case. As this Court recently stated in *Young*, "[S]tops as well as arrests must satisfy the Fourth Amendment requirement of reasonable cause commensurate with the extent of the official intrusion." *Young* v. *United States*, supra, slip op. at 6. In this case the police had ample cause to stop and question appellant for the brief period before probable cause for his arrest was established by the discovery of sneak-thief powder on his hand. The building had been vacant except for appellant, his co-worker and another policeman when the dresses were stolen. It was thus reasonable to suspect that one of the janitors at least was involved. The limited intrusion upon appellant's rights by the police was commensurate with the reasonableness of their suspicion.

II. The results of the ultra-violet light test were legally obtained.

A. Appellant freely and voluntarily placed his hand under the ultra-violet light.

Appellant argues that if he was not under arrest when he was being questioned, the conduct of the ultra-violet light test, to which the United States did not prove he "freely and voluntarily" consented, violated the Fourth Amendment. He places

principal reliance on *Bumper* v. *North Carolina*, 391 U.S. 522, 548 (1968).

The police testified that they advised appellant that he need not speak to them, that what he said might be used against him, and that he could have a lawyer present if he wished. They further testified that appellant indicated he was willing to cooperate with them because he had nothing to hide, and that he never indicated before or after the ultra-violet light test that he wished a lawyer or that he did not understand his "rights." Finally, they testified that they told him the purpose of the light test and asked, not commanded, that he place his hand under the lamp. There were, on their testimony, no threats, no promises, no force, no trickery.

The situation was thus different here from that encountered in *Bumper* or in *Judd* v. *United States*, 89 U.S. App. D.C. 64, 190 F. 2d 649 (1951). In *Bumper* four policemen came to the home of the defendant's elderly mother and announced that they had a warrant when in fact they did not. Her acquiescence to the search, without asking to see the warrant, was held not to have been fully and voluntarily given. In *Judd* police obtained "permission" to search the defendant's apartment from him during a period of interrogation in jail which took place for several hours late at night.[4]

The advice as to appellant's *Miranda*[5] rights is significant in determining whether he consented to the ultra-violet light test. The warnings, of course, were designed as a safeguard against coerced confessions. But apprising a suspect of his rights may be equally effective in insuring that other acts, which prove to be inculpatory, are voluntary. Indeed, the warnings are such a comprehensive prophylactic that giving them and making certain they are understood may vitiate the need for strict compliance with other requirements designed also to insure voluntariness. *See Frazier* v. *United States*, 136 U.S. App. D.C. 180, 419 F. 2d 1161 (1969).

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[4] Although appellant was questioned at police headquarters in this case, he was also at his place of work. He was not taken to another police station or placed in a cell, and his questioning was quite brief.

[5] *Miranda* v. *Arizona*, 384 U.S. 436 (1966).

Appellant did testify that his hand was put under the lamp and that he had requested a lawyer. Absent this testimony, which squarely conflicts with that of the police, appellant is left with the argument that the situation was so inherently coercive as to make any warnings meaningless. He chiefly relies in this argument on the proposition, extracted mainly from *Higgins* v. *United States,* 93 U.S. App. D.C. 340, 209 F. 2d 819 (1954), that no person would ever voluntarily inculpate himself. Appellant's contention ignores the demonstrable fact that people, after proper warning, do confess or otherwise inculpate themselves for a variety of reasons. Not infrequently, suspects cooperate in the hope of throwing the police off their trail and onto a wild goose chase. *Hicks* v. *United States, supra,* 127 U.S. App. D.C. at 213, 382 F. 2d at 162. In this case, for example, appellant may have thought that any powder that was on his hands would have been washed away during the course of his janitorial duties and that his best chance of avoiding ultimately being caught was to place his hand under the light in the hope that no powder traces were left.

B. The police would have been justified in compelling appellant to place his hand under the light.

Although we maintain that there is sufficient evidence to show that appellant voluntarily placed his hand under the ultra-violet light, it is our position that consent was not necessary to justify this reasonable and minor intrusion upon his privacy.

Appellant properly analogizes the ultra-violet light test to fingerprinting. Both are reliable and involve minimal intrusion. In *Davis* v. *Mississippi,* 394 U.S. 721 (1969), the Supreme Court held that fingerprinting a defendant during a period of illegal detention violated the Fourth Amendment. This Court reached the same result in *Bynum* v. *United States,* 104 U.S. App. D.C. 368, 262 F. 2d 465 (1959). *Bynum* and *Davis* do not necessitate reversal here, however, because in this case the detention of appellant for the brief period until the test took place was legal. *Cf. Bynum* v. *United States,* 107 U.S. App D.C. 109, 274 F. 2d 767 (1960).

Had there been probable cause for appellant's immediate arrest, there is no question that a full search, in addition to

inspection of his hand under ultra-violet light, would have been permissible. The detention, however, was not based on probable cause to arrest but upon reasonable suspicion. The question becomes, in this circumstance, whether the limited "search" which accompanied the limited detention of appellant was consistent with the Fourth Amendment. We submit that it was.

The Fourth Amendment, by its terms, proscribes *unreasonable* searches and seizures. The Supreme Court in *Terry* v. *Ohio, supra,* stressed the requirement of reasonableness in rejecting a "rigid all-or-nothing model of justification under the [Fourth] Amendment," which permits searches and seizures only upon probable cause, because that model "obscures the utility of limitations upon the scope, as well as the initiation, of police action." 392 U.S. at 17. Police activity short of an arrest and full search based on less than probable cause is thus neither completely foreclosed by the Fourth Amendment nor exempted from its requirement of reasonableness. The "central inquiry" in every case is "the reasonableness in all the circumstances of the particular governmental invasion of a citizen's personal security." *Id.* at 19. This inquiry, of necessity, involves a balancing of the "nature and extent of the governmental interests involved," *id.* at 22, against "the nature and quality of the intrusion on individual rights." *Id.* at 24. *Cf. Camara* v. *Municipal Court,* 387 U.S. 523, 534–537 (1967); *Castillo-Garcia* v. *United States,* 424 F. 2d 482 (9th Cir. 1970); *Stassi* v. *United States,* 410 F. 2d 946 (5th Cir. 1969).

Terry thus recognized not only the right of a policeman to stop a citizen on less than probable cause, but also the right to frisk him. Recognizing that "[e]ven a limited search of the outer clothing for weapons constitutes a severe, though brief, intrusion upon cherished personal security," 392 U.S. at 24–25, the Court nevertheless concluded that the "immediate interest," *id.* at 23, in assuring that the suspect was not armed was sufficient to justify the frisk. Although the safety of the police is not a matter of concern in this case, the "general interest . . . of effective crime prevention and detection . . . which underlies the recognition that a police officer may in appropriate circumstances and in an appropriate manner approach a person for purposes of investigating possibly criminal behavior even

though there is no probable cause to make an arrest" is involved. *Id.* at 22. The quick and effective means of detecting crime specifically at issue here, moreover, causes quite minimal personal inconvenience and invasion of privacy. Given the propriety of a stop, the reasonableness of the simple investigative measure of an ultra-violet light test which is highly appropriate but innocuous and very limited in scope seems logically to follow.

The Supreme Court in *Davis* v. *Mississippi, supra,* recognized the slight personal intrusion which is occasioned by the comparable fingerprinting process:

> Detention for fingerprinting may constitute a much less serious intrusion upon personal security than other types of police searches and detentions. Fingerprinting involves none of the probing into an individual's private life and thoughts that marks an interrogation or search. . . . Furthermore, fingerprinting is an inherently more reliable and effective crime-solving tool than eyewitness identifications or confessions and is not subject to such abuses as the improper line-up and the "third degree." 394 U.S. at 727.

The Court found that detention without probable cause in that case of a large number of "suspects," including the petitioner, for the purpose of obtaining fingerprints was unreasonable. The facts of *Davis* are, however, significantly different from those presented in this case. A white girl had allegedly been raped by a black youth. Her only description of him was that he was a Negro, but latent fingerprints were found on the window of her house through which he apparently had entered. For about a ten-day period thereafter the police, without warrants, seized and "took at least 24 Negro youths to police headquarters where they were questioned briefly, fingerprinted, and then released without charge. The police also interrogated 40 or 50 other Negro youths either at police headquarters, at school, or on the street." 394 U.S. at 722. It is clear that the police in *Davis* did not even have reasonable suspicion that the petitioner, or any other individual, was involved. All they knew was that the assailant was a black youth; all black youths in the town were

equally suspect, and many, if not all, were interrogated or fingerprinted.

In condemning the dragnet detentions in *Davis*, the Court, recognizing the "unique nature of the fingerprinting process," nevertheless specifically left open the possibility that "[d]etentions for the sole purpose of obtaining fingerprints . . . might, under narrowly defined circumstances, be found to comply with the Fourth Amendment even though there is no probable cause in the traditional sense." 394 U.S. at 727. The kind of circumstance which the instant case presents is, we submit, one narrow situation in which minimal intrusion such as fingerprinting or conduct of the ultra-violet light test is reasonable under the Fourth Amendment despite the lack of traditional probable cause for a traditional arrest. There were but two suspects, and the police had strong reason to believe that one or both were involved. The inconvenience was, in fact, less than would probably be involved in fingerprinting. Appellant was not taken to a police station [6] and was detained only momentarily; the test with a portable lamp was conducted within a few feet of where he was approached and within two minutes after his initial contact with the officers. The "search" of defendant, even if he did not give his consent, was thus completely consistent with the Fourth Amendment's requirement of reasonableness as discussed in *Terry* and *Davis*.

CONCLUSION

WHEREFORE, it is respectfully submitted that the judgment of the District Court should be affirmed.

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[6] See footnote 4, *supra*.

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UNITED STATES COURT OF APPEALS
FOR THE DISTPICT OF COLUMBIA CIRCUIT

No. 24,392

UNITED STATES OF AMERICA,

Appellee,

v.

ROBERT L. WILLIAMS,

Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT
COURT FOR THE DISTRICT OF COLUMBIA

REPLY BRIEF OF APPELLANT

United States Court of Appeals
for the District of Columbia Circuit

FILED NOV 30 1970

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TABLE OF CASES, STATUTES, AND OTHER AUTHORITIES

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COURT FOR THE DISTRICT OF COLUMBIA

REPLY BRIEF FOR APPELLANT

Preliminary Statement

Defendant's main brief showed that the critical trial evidence against him - the result of an in-custody scientific test - should have been suppressed for two independent reasons: it was obtained from him (1) pursuant

to an invalid arrest and (2) without his consent.

Defendant either was, or was not, under arrest when the test was given. If he was under arrest the test results were the fruit thereof and must be suppressed since there was no probable cause for the arrest, as the government concedes. (See Sections I.A and II.B of Brief for Appellee). If, on the other hand, defendant was not under arrest when the test was given then its results are admissible only if he consented to it and under the decisions of this court, not distinguished by the government, defendant did not so consent. Judd v. U.S., 89 U.S. App. D.C. 64, 190 F.2d 649 (1951); Higgins v. U.S., 93 U.S. App. D.C. 340, 209 F.2d 819 (1954).

The government's position is (1) since defendant was not under arrest, but was merely "detained" when he was tested, the test results are not the fruit of an illegal arrest, (2) further, the defendant agreed to take the test, (3) but even if he did not agree, police could have searched him without his consent for evidence of guilt since under Terry v. Ohio, 392 U.S. 1 (1968), police may search a suspect for weapons in the absence of probable cause. Each of these contentions is examined below.

I. DEFENDANT WAS UNDER ARREST WHEN THE TEST WAS ADMINISTERED.

Since the government concedes there was no probable cause to arrest defendant at the time he was taken into the interrogation room, the only question is whether his detention amounts to an arrest. Defendant contends that he was, in fact, under arrest when the police stopped him in the hall or, if not then, certainly when they took him into the sergeant's office in order to administer the floure-scent light test under Kelley v. United States, 111 U.S. App. D.C. 396, 398, 293 F.2d 310, 312 (1961) and Jackson v. United States, 118 U.S. App. D.C. 341, 336 F.2d 579 (1964). Appellee does not distinguish these cases but instead argues the detention was not an arrest citing Fuller v. United States, 132 U.S. App. D.C. 264, 407 F.2d 1199 (1968), cert. denied, 393 U.S. 1120 (1969).

The facts in Fuller, however, are very different from those here. There defendant was given a choice not only of whether to speak or not to speak to the police, but where he wished to speak to them. It was the defendant's choice that they "go" to the police station, an understandable choice considering the fact that his place of employment was noisy and crowded with his co-workers. The police there were

following the defendant's election and not vice-versa as here. Here the defendant had already decided to leave, his work being over, when he "was taken" to the interrogation room.

Second, the detention here had a very specific objective, i.e., to test the defendant's hand for the presence of sneak-thief powder. Moreover, the test would determine defendant's "guilt or innocence". (Tr.66). It strains credulity to believe there was any purpose for the detention other than to administer the test. Thus the defendant's understanding that he was not free to go until he took the test was entirely reasonable, whether his understanding of the situation is to be deemed decisive, as in Kelley, supra, or simply material as in Fuller, supra. Using the "reasonable man" standard of U.S. v. McKethan, 247 F.Supp. 324, 328-29 (D.D.C. 1968), a person would be foolish indeed to conclude that he was free to go after being told that the police wished to perform such a test, the results of which would be so clear-cut. Whereas in Fuller the police were investigating to determine whether to take the defendant into custody, here that decision had already been effected as evidenced by the police's specific plans to administer the flourescent light test, not simply

to interrogate. It follows that Kelley and Jackson, supra, are controlling, not Fuller, supra, and that defendant was under arrest when the test was administered.

II. DEFENDANT DID NOT CONSENT TO THE SEARCH AND POLICE OFFICERS HAD NO RIGHT TO SEARCH HIM ABSENT HIS CONSENT.

The government wholly fails to distinguish Judd v. U.S., supra, and Higgins v. U.S., supra, to cite contrary authority or otherwise to establish that defendant meaningfully agreed to take a test which could only incriminate him. These cases establish that evidence of waiver of a constitutional right must be clear and persuasive, that the government's burden reaches its zenith when the supposed consent occurs during custodial interrogation, and that statements identical to those alleged to be made by defendant here do not meet these criteria and are, therefore, insufficient to show defendant consented to take the test.

Appellee characterizes defendant's consent to the arrest and examination: [A]ppellant indicated he was willing to cooperate with them [the police] because he had nothing to hide." Appellee Brief at 11. In fact the only statement he made indicating his willingness to cooperate was a "me too", and that statement was made only after his co-worker said that

he wouldn't mind talking to the police. Later, in another room, appellant indicated that the police could examine his hand "because he had nothing to hide." The court has held that such a statement is not adequate to show consent. Judd, supra; see also Channel v. U.S., 285 F.2d 217 (9th Cir. 1960).

The government suggests that defendant's "consent" was meaningful since suspects frequently seek to throw police "off their trail and onto a wild goose chase" by co-operating with police. This assertion is ludicrous when reduced from its level of generality and applied to the concrete facts here. If, as the police testified, the test was clearly explained to defendant, then it is at variance with every instinct of self-preservation for him to have consented since the test would plainly show his guilt. Thus given reasonable assumptions about human behavior, consent cannot be implied from statements such as "I have nothing to hide" made by a defendant who does not admit guilt. As this Court in Higgins, supra, said:

> "No sane man who denies his guilt would actually be willing that policemen search his room for contraband which is certain to be discovered. It follows that, when police identify themselves as such, search a room, and find contraband in it, the occupant's words or signs of acquiescence in the search, accompanied by a denial of

> guilt, do not show consent . . ." (Higgins v. U.S., 93 U.S. App. D.C. 340, 341, 209 F.2d 819, 820 (1954).

The government's final argument, based on Terry v. Ohio, supra, is that the police are free to search a defendant, not only for their own protection, but for evidence of guilt if they suspect that the defendant has committed a crime.

This position, if sanctioned by this Court, would simply do away with the Fourth Amendment requirement that searches of the person or places be made only on warrant or after arrest based on probable cause. Terry permits a search by a police officer solely "for the protection of the police officer, where he has reason to believe that he is dealing with an armed and dangerous individual, regardless of whether he has probable cause to arrest the individual for a crime." Id. at 27. These searches and seizures are protective as opposed to investigatory in nature. In Terry the Court found that:

> "On the facts and circumstances detailed before the trial judge a reasonably prudent man would have been warranted in believing petitioner was armed and thus presented a threat to the officer's safety while he was investigating his suspicious behavior . . . [T]he record evidences the tempered act of a policeman who in the course of an investigation had to make a quick decision to protect himself and others from possible danger, and took limited steps to do so." Id. at 28.

While the Supreme Court reasonably concluded that police safety is a sufficient reason to create a minor exception to Fourth Amendment prohibitions, it is quite different to urge that a suspect may be searched without probable cause and when he is not arrested, for reasons unrelated to preventing injury to law officers. Here the government concedes that police protection was not the purpose of the ultra-violet light search. Rather, the search here was investigatory - a search made in order to obtain probable cause to arrest. Such a search connot, however, be justified by what it uncovers. Bumper v. State of North Carolina, 391 U.S. 543 (1968); Davis v. Mississippi, 394 U.S. 721 (1969).

CONCLUSION

For the foregoing reasons appellant respectfully submits the judgment of the trial court must be reversed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I have served the foregoing Reply Brief of Appellant upon the United States by mailing a copy thereof to John A. Terry, Assistant United States Attorney, United States Courthouse, Washington, D. C. 20001, this Thirtieth day of November, 1970.

Stephen M. Truitt

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA

No. 24,392

UNITED STATES OF AMERICA,

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC

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FILED MAY 24 1971
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PETITION FOR REHEARING AND SUGGESTION FOR
REHEARING EN BANC

Pursuant to Rules 35 and 40, F.R.App. P., defendant requests the panel to grant rehearing and reverse his conviction. Alternatively, defendant suggests that this case should be reheard en banc to maintain uniformity of this court's decisions establishing standards of what constitutes consent to search during a period of custodial interrogation.

Statement of Facts

Defendant was employed as a janitor by Harlow Typographical, Inc., at 35 K Street, N.E. (Tr. 52, 53, Kerick Testimony). His general duties included cleaning and waxing the building, including its first floor which was rented from Harlow by the Metropolitan Police Department and used as headquarters for the Criminal Investigation Division East (Tr. 8, 9, Kerick Testimony).

At approximately 6:45 a.m. on October 26, 1969, defendant reported to work (Tr. 38, Coachman Testimony). At approximately 10:00 a.m. Detective Kerick, the arresting officer, observed that five dresses which had been stored in the police property room at the back of the first floor, were missing (Tr. 13, Kerick Testimony). The door to that room had been locked earlier that morning before defendant's arrival (Tr. 11, Kerick Testimony). The missing dresses had been placed in the police property room by Detectives Genoa and Kerick at approximately 6:00 a.m. the same morning and had been dusted with sneak powder, a substance which though invisible to the naked eye becomes visible when illuminated by an ultra-violet light (Tr. 10, 16, Kerick Testimony). Upon observing that the dresses were missing the police unsuccessfully searched the entire premises at 35 K Street to find them (Tr. 14, Kerick Testimony).

Defendant's employer, Mr. Harlow, who also owned the premises was summoned by Lt. Gosman (Tr. 30) although he was neither a witness to, nor victim of the crime.

At approximately 1:00 p.m. after defendant had finished his cleaning duties and was preparing to leave work he and his co-worker, Richard Coachman, were both approached by Mr. Harlow, Detective Smith, Sgt. Genoa, Lt. Gosman and Detective Kerick, who asked them whether they knew anything about the property missing from the police property room (Tr. 60, Kerick Testimony; Tr. 41, Williams Testimony; Tr. 38, Coachman Testimony; Tr. 15, Kerick Testimony).

On being asked about the missing property the defendant denied any knowledge of the theft. The police officers then requested both janitors to talk to them concerning the theft. Mr. Coachman said "I have nothing to hide. I will be glad to talk to you," and defendant said "Me too."

Defendant was thereupon given his Miranda warnings. The police officers did not supplement this warning nor otherwise indicate that the defendant need not subject himself to the scientific ultra-violet light test administered to him shortly thereafter. Defendant was then escorted by two police officers, one in front, one in back, to an office. Also present in this room was defendant's employer, Mr. Harlow

(Tr. 19) whom the police had summoned as soon as the theft occurred (Tr. 30).[1/]

Upon defendant's entering the office, Det. Kerick

> "explained to him first that property that had been missing had been treated with a powder. And then I asked him if he would mind putting his hand under a light. And he said, no, he had nothing to hide. And he placed his hand under a light and I turned on the light." (Tr. 19).

The light showed the presence of the sneak-thief powder whereupon Kerick immediately arrested defendant, again advised him of his rights, and searched him (Tr. 19-21, Kerick Testimony). The search revealed narcotics paraphernalia, and a key which opened the police property room (Tr. 64, Kerick Testimony). At this time, according to Detective Kerick, defendant stated that he had stolen the dresses in order to support a narcotics habit and led the police to the

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1/ Det. Gosman testified, contrary to Det. Kerick's recollection of events, that Mr. Harlow was not present in the interrogation room at the inception of the questioning but entered only after the test was administered (Tr. 34). In any event he was on the premises. According to the disinterested testimony of defendant co-worker, Coachman, it was Harlow, not the police who first approached the defendant:

> "Q Did there come a time later on in the day when police officers questioned you?
>
> A. Yes. When we all got through Mr. Harlowe said, the lieutenant wants to talk to you."

dresses (Tr. 22, Kerick Testimony). Detective Kerick testified that at no time did defendant request a lawyer.

A motion to suppress testimony as to the test result, inter alia, was denied and defendant was convicted by the Court of petit larceny and second degree burglary. The sole issue on appeal is the propriety of the court's denial of the motion to suppress.

The Panel's Opinion

On appeal, defendant urged that he was in fact under arrest when he was taken into the office for interrogation and that this arrest, concededly not based on probable cause, was the source of all the evidence against him. The panel's opinion found defendant was not under arrest when he was escorted to the office where he was questioned and this finding does not warrant rehearing.

The panel then proceeded to defendant's second argument - that he had not meaningfully consented to take the test, and that information secured thereby should have been suppressed - finding:

> "... we conclude that this record supports a conclusion that appellant consented to take the test without being under the coercion of arrest. See Fuller v. United States, 132 U.S.App. D.C. 264, 407 F.2d 1199 (1968), cert. denied, 393 U.S. 1120 (1969). Appellant's relationship to the premises as being his place of employment perhaps provided a special incentive to his giving of consent, but that was not a consideration for which the police were responsible."

The panel's finding of consent here was based on a misapprehension of applicable principles for determining when an employee-suspect's in-custody consent to a search is voluntary, principles enunciated in Garrity v. New Jersey, 385 U.S. 493 (1966), and thus rehearing by the panel is appropriate. In addition, the panel's finding of consent was inconsistent with two prior decisions of this court relating to consent searches - Judd v. U.S., 89 U.S. App. D.C. 64, 190 F.2d 649 (1951); Higgins v. U.S., 93 U.S.App. D.C. 340, 209 F.2d 819 (1954), and should therefore be reconsidered by the court en banc.

Argument

(1) The panel's opinion, recognized that defendant's interrogation at "his place of employment" was relevant to the issue of his consent to the search and "perhaps provided a special incentive" for giving of consent. The panel apparently believed that because the police were not responsible for the incentive, that defendant's agreeing to take the test was voluntary. In fact, defendant's employer, Mr. Harlow, was present solely because the police called him to the scene from his home and indeed brought him into the room where defendant's interrogation took place, although he was not needed to assist in investigating the crime (Tr. 30, 39). The police then, were responsible for the

fact of Mr. Harlow's presence and the palpable threat of job loss infecting defendant's interrogation and consent here.

Even if the police were not responsible for the coercing circumstances here, voluntariness of consent may be affected by many other factors than police misconduct, including the threat of job loss for failure to cooperate with police. In Garrity v. New Jersey, supra, the Supreme Court held that statements obtained from government employees under threat of job loss were produced by coercion: 2/

> "The choice given petitioners was either to forfeit their jobs or to incriminate themselves. The option to lose their means of livelihood or to pay the penalty of self-incrimination is the antithesis of free choice to speak out or to remain silent. That practice, like interrogation practices we reviewed in Miranda v. Arizona, 384 U.S. 436, 464-465, is 'likely to exert such pressure upon an individual as to disable him from making a free and rational choice.' We think the statements were infected by the coercion inherent in this scheme of questioning and cannot be sustained as voluntary under our prior decision." (Emphasis supplied). 385 U.S. at 497,8.

The "consent" by defendant here was no less the

2/ Defendant does not urge that the test results are "testimonial" within the meaning of the Fifth Amendment, but rather relies on Garrity's holding that the threat of job loss renders waiver of a constitutional right involuntary.

product of coercion. Det. Kerick testified:

> "A. ... he kept saying to Mr. Harlowe he was very concerned about his job because he had a family to support and he wanted to cooperate in every way.
>
> Q. Was he talking to Mr. Harlowe in response to any police questions?
>
> A. Not to my knowledge as far as police questions.
>
> Q. Was Mr. Harlowe asking him any questions when he was talking to Mr. Harlowe, do you recall?
>
> A. Mr. Harlowe didn't say very much; no, sir. He just told him he would have to wait and see about his job, to my knowledge."

Although this testimony relates to defendant's conduct immediately after the test was given, it is certainly indicative of what defendant's state of mind was a minute or so before when he "agreed" to take the test, as well as his entire perception of the situation: i.e. non-cooperation would mean loss of employment. (See also Tr. 34).

In light of Garrity, the panel's basing its finding of consent on the absence of police fault was plainly founded on the impermissible misapprehension that if the police were not responsible for the coercion there is no coercion. Even if police are not responsible for the coercing circumstances they are still prohibited from taking advantage of them,

and the circumstances can, independently of police conduct, render a supposed waiver involuntary:

> "Where the choice is 'between the rock and the whirlpool' duress is inherent in deciding to 'waive' one or the other.
>
> > 'It always is for the interest of a party under duress to choose the lesser of two evils. But the fact that a choice was made according to interest does not exclude duress. It is the characteristic of duress properly so called.' Ibid." 385 U.S. at 498.

Here, the police testimony indicates that defendant's concern for his job was the basis for his "consent" to take the scientific test on which his conviction rests. Such a consent is not voluntary.

2. Apart from the inherently coercing circumstances where the police both interrogate and employ, the evidence of defendant's intelligent consent to the search here rests on a single statement by him: "I have nothing to hide." (Tr. 19). Defendant made this statement after the foolproof nature of the test was carefully explained to him (Tr. 66). Under two cases of this court, cited to the panel, but not mentioned in their opinion, such slender evidence of consent to a search inevitably bound to convict the defendant, is insufficient. Judd v. U.S., 89 U.S.App. D.C. 64, 190 F.2d 649 (1951); Higgins v. U.S., 93 U.S. App.

D.C. 340, 209 F.2d 819 (1954). These cases squarely hold that an in-custody statement by one who denies guilt to the effect that "he has nothing to hide" is not a meaningful consent to a search which is certain to unearth convicting evidence. Defendant submits that Judd and Higgins have not been and cannot be distinguished by the government or the panel. If these cases are no longer viable in the circuit, the court en banc should so hold, rather than a single panel.

CONCLUSION

For the foregoing reasons the Court should grant rehearing and reverse defendant's conviction.

Respectfully submitted,

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Appointed by this Court

CERTIFICATE OF SERVICE

I hereby certify that I have served the foregoing Petition for Rehearing and Suggestion for Rehearing En Banc upon the United States by mailing two copies thereof to John A. Terry, Assistant United States Attorney, United States Courthouse, Washington, D. C. 20001, this Twenty-fourth day of May, 1971.

Stephen M. Truitt

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